

How WorkSafe applies the law in relation to

Employing or engaging suitably qualified persons to provide health and safety advice

A Guideline made under section 12 of the
Occupational Health and Safety Act 2004

Edition No. 1
October 2008



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What this WorkSafe Position is about

This document sets out WorkSafe's position on the meaning of section 22(2)(b) in the context of duty-holders meeting their obligations under Part 3 of the *Occupational Health and Safety Act 2004* (OHS Act).

Part 3 (sections 21 to 23) of the OHS Act places duties on employers to ensure health and safety.

Section 22(2)(b) provides that employers must, so far as is reasonably practicable, employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees of the employer.

Who does this WorkSafe Position apply to?

Employers who have duties to ensure health and safety under Part 3 of the OHS Act.

Date

The WorkSafe Position was made on 24 October 2008.

WorkSafe Position on employing or engaging a person who is suitably qualified to provide OHS advice

When does an employer have to employ or engage a suitably qualified person to provide OHS advice?

Employers are expected to take a proactive approach to identify and control hazards in the workplace before they cause an incident, injury, illness or disease.

Some employers may control the OHS risks in their workplace by building in-house OHS skills and getting help and advice from a range of sources such as WorkSafe's Advisory Service, inspectors, published guidance, compliance codes and the Occupational Health and Safety Regulations 2007. Other sources of help include industry or employer associations and unions.

However, there may be times when the employer's knowledge of OHS and the circumstances in their workplace mean that further expertise is required to control the risks.

Section 22(2)(b) is designed to ensure that employers, so far as is reasonably practicable, obtain advice from suitably qualified persons to help them make informed decisions about how to comply with their duties under Part 3 of the OHS Act. The factors in section 20(2) apply when determining what is 'reasonably practicable'.

The test for what is reasonably practicable is an objective test based on what a reasonable person in the employer's position who is required to comply with the same duty should know.

The following are examples of when employers might consider employing or engaging a person to advise on OHS:

- during periodic OHS reviews of the operations of the business
- when developing and implementing systems for the long term management of OHS

- when establishing OHS consultative and issue resolution structures for the workplace
- when planning to modify the work premises, plant, substances or materials for use at work
- before changes to work practices and systems of work are introduced
- when establishing new operations or projects
- prior to major shut down, decommissioning, demolition of premises or plant
- when new OHS information becomes available from an authoritative source
- when a hazardous exposure or incident, injury, illness or adverse result of environmental or health monitoring indicates that risk control measures are inadequate
- when managing complex issues related to psychological health such as bullying and stress.

If an employer decides to obtain further OHS advice to deal with health and safety risks at the workplace and implement appropriate controls, the next step is to decide whether it is preferable to directly employ a suitably qualified person or to engage them under a contract for services or other arrangement. For example, an employer might employ a person on a continuing basis or alternatively engage a suitably qualified consultant on a one-off or as needs basis.

The suitably qualified person should be available to provide advice to the employer in a timely manner, as and when needed. There is no requirement under section 22(2)(b) for the person to be permanently located at the workplace, although this may be appropriate depending on the nature and extent of the hazards and risks and other factors.

Complex or high risk situations may need more than one person to provide advice to the employer on a range of hazards concerning the health and safety of the employer's employees.

WorkSafe will consider the following matters when deciding whether an employer has done what is reasonably practicable to meet their duty in section 22(2)(b):

- the hazards and risks in the employer's workplace
- the likelihood of these eventuating
- the degree of harm that may be caused by these hazards and risks
- the state of knowledge as to how to eliminate or reduce these risks, and
- the costs of these options.

It is important to note that employing or engaging a suitably qualified person to provide OHS advice does not discharge the employer from their legal responsibilities to ensure health and safety as required under Part 3 of the OHS Act. This duty cannot be delegated.

Who is a suitably qualified person?

'Suitably qualified' means having the knowledge, skills and experience to provide advice on the issues impacting the health and safety of the employees of the employer. The advice must reflect the current state of knowledge on OHS issues so the employer can rely on this advice when controlling the risks in their workplace.

The suitably qualified person must be able to advise the employer about the process of identifying hazards and implementing controls to eliminate or reduce the assessed risks, and how to monitor and review those controls.

The type of person required will always depend on the circumstances (ie the type of workplace and its hazards).

The following matters, all of which WorkSafe may take into account, should all be considered when assessing whether a person has the skills, knowledge and experience to be suitably qualified:

- **Knowledge:** Can the person demonstrate they have relevant knowledge in OHS or a related field through the completion of education? If no formal qualifications, can the person through alternate means establish they understand the current state of knowledge on the issue and OHS principles and legislation?
- **Industry experience:** Has the person worked in the employer's industry, with employers of like size and structure, dealt with similar plant or equipment, addressed issues and evaluated the impact of possible interventions?
- **Professional activity:** Can the person demonstrate recent professional activity in the field of OHS in which they intend to provide advice? How long has the person been professionally active?
- **Reputation:** Is the person reputable and able to provide referees who can attest to the quality and utility of their work?
- **Professional association:** Is the person a member of a professional association that requires the attainment of and continuing development of certain knowledge, skills and experience for membership?
- **Communication skills:** Is the person able to explain what needs to be done to control any hazards or risks and write reports that are easy to understand?
- **Technical expertise:** If the person is monitoring conditions in the workplace, is their equipment suitable, appropriate and accurate? Does the person have the skills to use the equipment and analyse the results?
- **OHS legislative understanding:** Is the person familiar with OHS legislation?
- **Risk management strategies:** Is the person's approach consistent with the principle of ensuring the highest level of protection so far as is reasonably practicable? For example, it should focus on elimination of the risks rather than lower order controls such as using personal protective equipment or monitoring.

A wide range of specialist OHS advice is available to employers. For example:

- OHS management consultants can advise on health and

safety management systems, how to comply with the OHS Act, and on consultative and issue resolution mechanisms.

- Ergonomists can advise on factors that influence the way a person does their work and the associated risks, including the way work is organised, the design and layout of tools and equipment and, in some cases, psychological risks.
- Hygienists can advise on controlling risks concerning chemicals and biological factors.
- Dangerous goods specialists can advise on the safe storage and handling of dangerous goods.
- Other specialists can advise on the safety aspects of plant and equipment.

A suitably qualified person is not expected to be expert in every aspect of occupational health and safety but they must recognise the limits of their competence and identify for the employer when further expertise is necessary.

Explanation

The case law that WorkSafe has taken into account in formulating this position includes:

- *Holmes v R E Spence & Co Pty Ltd* (1992) 5 VIR 119

Related WorkSafe Positions

How WorkSafe applies the law in relation to reasonably practicable

How WorkSafe applies the law in relation to identifying and understanding hazards and risks

Effect of this WorkSafe Position

Under Section 15 of the *Occupational Health and Safety Act 2004*, this WorkSafe Position does not give rise to any liability of, or claim against, WorkSafe Victoria. It does not give rise to any right, expectation, duty or obligation that a person may not otherwise have. It does not give rise to any defence that would not otherwise be available to a person.

WorkSafe Victoria will not act inconsistently with this document. WorkSafe Victoria's actions in relation to this document do not affect the operation of the *Occupational Health and Safety Act 2004* or the Occupational Health and Safety Regulations 2007 made under the Act.

Glossary

Duty-holder is any person referred to in the 'What this WorkSafe Position is about' section of this document.

OHS is occupational health and safety.

State of knowledge is the knowledge that the duty-holder has, or ought reasonably to have, about a hazard or risk. See further explanation of the meaning of 'state of knowledge' in the WorkSafe Position, *How WorkSafe applies the law in relation to reasonably practicable*.